



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40980

MARIO ATENCIO; PAUL AND MARY ANN ATENCIO; DANIEL TSO; SAMUEL SAGE;
CHEYENNE ANTONIO; KENDRA PINTO; JULIA BERNAL; JONATHAN ALONZO;
PASTOR DAVID ROGERS; YOUTH UNITED FOR CLIMATE CRISIS ACTION (YUCCA);
PUEBLO ACTION ALLIANCE; INDIGENOUS LIFEWAYS; THE CENTER FOR
BIOLOGICAL DIVERSITY; and WILDEARTH GUARDIANS, Plaintiffs-Petitioners,

v.

THE STATE OF NEW MEXICO; THE NEW MEXICO LEGISLATURE; GOVERNOR
MICHELLE LUJAN GRISHAM; NEW MEXICO ENVIRONMENT DEPARTMENT;
SECRETARY JAMES KENNEY in his official capacity; ENERGY, MINERALS & NATURAL
RESOURCES DEPARTMENT; ACTING SECRETARY ERIN TAYLOR,¹ in her official
capacity, ENVIRONMENTAL IMPROVEMENT BOARD, and the OIL CONSERVATION
COMMISSION, Defendants-Respondents,

-and-

INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO, NEW MEXICO
CHAMBER OF COMMERCE, Intervenor-Defendants-Respondents.

ANSWER BRIEF

ORAL ARGUMENT REQUESTED PURSUANT TO RULE 12-319(B)(1) NMRA

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RULE 12-318(G) NMRA STATEMENT OF COMPLIANCE

The body of this Answer Brief uses a proportionally-spaced typeface (Times New Roman), contains 10,967 words, as counted by Microsoft Word Version 2602 (Build 19725.20126 Click-to-Run), and thus complies with the limitations of Rule 12-318(F)(3) NMRA.

INTRODUCTION

Article XX, Section 21 of the New Mexico Constitution expressly assigns the Legislature responsibility to balance environmental concerns with the use and development of natural resources:

The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

N.M. Const. art. XX, § 21. Giving effect to the plain meaning of the constitutional text, the Court of Appeals recognized this and correctly rejected Plaintiffs-Petitioners' ("Plaintiffs") effort to transform Section 21 into a new positive individual right to pollution control.

Section 21 specifies that the Legislature, not the Judiciary, determines the proper balance of natural resource development and pollution control to best serve the collective interests of New Mexicans. The Executive then uses regulatory and enforcement authority to implement the balance of interests the Legislature strikes. **[Op. ¶ 29].** ("Because the PCC imposes only a duty on the Legislature to 'provide for' pollution control 'consistent with' resource use and development, and does not contain rights-creating language nor a standard by which we may measure pollution limitation, we conclude that it does not create an individual right the judiciary may enforce or protect.").

With the state constitution assigning the political branches responsibility over determining how resource extraction will coexist with pollution control, Plaintiffs' other constitutional claims fail as well. There is not a right, liberty, or property interest to support Plaintiffs' due process claim. *Id.* ¶¶ 52-57. And there is no government classification to support an equal protection challenge to generally applicable, neutral statutes and regulations. *Id.* ¶¶ 58-61.

Plaintiffs' claims would upend the balance of power between co-equal branches of government, shutting down oil and gas permitting until a judge decides the Legislature and the Executive branch have implemented a sufficient statutory, regulatory, and enforcement framework and associated appropriations to protect the environment at a level satisfactory to the Judiciary. [1 RP 36, 104-106]. Because the Judiciary cannot determine the proper balance of natural resource development and pollution control that provides the maximum benefit to New Mexicans – the unavoidable policy issue presented – and cannot grant the expansive relief Plaintiffs request, this Court should affirm dismissal of the Complaint.

SUMMARY OF PROCEEDINGS

Plaintiffs sued the New Mexico Legislature and several executive agencies (the “Executive Defendants”), seeking to shift to the Judiciary ultimate authority over laws that balance resource extraction to benefit the public with pollution control. [1 RP 1-107]. Plaintiffs sought to accomplish this through state

constitutional claims under Section 21, and under the due process and equal protection clauses of Article II, Section 18. [1 RP 95-104]. They demanded sweeping relief in the Complaint, including demanding that the district court: (1) determine a sufficient statutory, regulatory and enforcement framework and fiscal appropriation to control pollution, (2) order the Legislature and executive departments to adopt, establish, and fund this judicially-developed framework, and (3) order the defendants to cease *all* permitting of oil and gas development until they have adopted laws and regulations that satisfy judicially imposed requirements. [1 RP 104-06, ¶¶ 1-12]. Plaintiffs further asked the district court to rewrite statutes to remove exemptions for oil and gas production, *id.* ¶ 9, to reenact laws previously repealed by the Legislature, *id.* ¶ 12, and to oversee pollution control and oil and gas development indefinitely, *id.* ¶ 13.

The Executive Defendants-Appellees moved to dismiss the Complaint on three grounds. First, the New Mexico Constitution does not guarantee individuals a judicially-determined level of environmental protection. Second, constitutional separation of powers and related prudential rules bar judicial review and the relief Plaintiffs seek. And third, existing statutes and regulations are rationally related to legitimate government interests and are not subject to heightened constitutional review. [1 RP 219-46].

The district court denied the motion to dismiss but found the matter appropriate for interlocutory appeal. **[5 RP 1075-76]**. The Court of Appeals reversed, concluding that the Pollution Control Clause did not create a judicially enforceable individual right, and that the Complaint did not otherwise assert viable or justiciable claims for relief. **[Op. ¶ 1]**. Plaintiffs appeal.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews statutory and constitutional interpretation *de novo*. In reviewing a motion to dismiss, courts accept well-pleaded factual allegations, but do not credit legal conclusions or allegations that contradict statutes and published regulations. *C & H Constr. & Paving, Inc. v. Found. Rsrv. Ins. Co.*, 1973-NMSC-076, ¶ 9, 85 N.M. 374 (“[C]onclusions of law or unwarranted deductions of fact are not admitted” (quoting 2A Moore’s Fed. Practice, 2d Ed. 1972, § 12.08 at 2265)).

Applying these principles, Plaintiffs’ allegations regarding administrative pathways to challenge oil and gas permits, or to propose additional environmental regulation of oil and gas production, **[BIC 6, 29 n.18]**, are reviewed *de novo* as legal conclusions. This Court should reject those conclusions because existing statutes and regulations allow intervention in permitting proceedings and create mechanisms to propose environmental regulations. *See infra* Section III.C.1.

II. SECTION 21 EXPRESSLY DELEGATES POWERS TO THE LEGISLATURE AND DOES NOT CREATE INDIVIDUAL RIGHTS.

Plaintiffs' claims rest on the assumption that Article XX, Section 21 of New Mexico Constitution ("Section 21" or "PCC") creates an individual right to environmental conditions and permits judicial enforcement of that positive right. [1 RP 4]. Section 21 contradicts that interpretation because it grants the Legislature sole discretion to balance pollution control with resource development in the best interest of New Mexicans as a whole and does not include language supporting an individual positive right.

A. Section 21 Confirms the Legislature's Authority to Regulate Pollution and Set Natural Resource Policy.

Section 21 consists of two sentences, a preface, and a charge:

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

N.M. Const. art. XX, § 21. This language, balancing pollution control with the use and development of the State's natural resources, describes legislative policymaking. Section 21 instructs the Legislature to provide for control of pollution "consistent with the use and development of these resources for the maximum benefit of the people," recognizing that pollution control interests may give way to development of natural resources when the Legislature decides that development

serves the interest of New Mexicans. *Id.*² The terms “control,” “consistent with,” and “maximum benefit of the people” describe a determination of collective public interest that balances competing benefits and harms i.e., legislative policy-making, not an individual right.³

The first sentence of Section 21 reinforces the Legislature’s broad discretion, stating that protection of the environment is of “fundamental importance to the public interest, health, safety and the general welfare.” *Id.* This language parallels constitutional language setting out legislative powers. *Compare* N.M. Const. art. IV, § 1 (vesting legislative power and exempting laws for the “preservation of the public peace, health or safety” from annulment by petition), with N.M. Const. art. XX, § 21.

² Plaintiffs would read “natural resources” in Section 21 to refer to “air and water,” not oil and natural gas. **[BIC 13 n.4]**. This reading renders the phrase “development of these resources” meaningless because “air and water” are not developed. Other constitutional provisions use “natural resources” to refer inclusively to oil, natural gas, and mineral resources. N.M. Const. art. VIII, § 10 (creating Severance Tax Permanent Fund for funds related to severance of “natural resources”); *State ex rel. Salazar v. Humble Oil & Ref. Co.*, 1951-NMSC-059, ¶¶ 2, 75, 77, 55 N.M. 395 (discussing adoption of the Severance Tax Permanent Fund authorizing taxation of the severance of “natural resources” including oil and gas). Constitutional provisions are read *in pari materia* with prior enactments presuming that the drafters knew and adopted the meaning and definition of terms used in other constitutional provisions. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 26. The Court should interpret the term “natural resources” to include oil and natural gas in Section 21 consistent with other constitutional provisions.

³ The term “control,” allows the Legislature to regulate pollution based on its assessment of the public interest.

Section 21 places pollution control with other police powers at the zenith of legislative power and discretion.⁴

The significance of this “health, safety and general welfare” language was well-established when Section 21 was adopted in 1971. *See Arnold v. Bd. of Barber Examiners*, 1941-NMSC-003, ¶¶ 38-40, 45 N.M. 57 (“The courts have recognized a wide latitude in the Legislature to determine the necessity for protecting the peace, health, safety, morals, and general welfare of the people.”); *Flaska v. State*, 1946-NMSC-035, ¶ 25, 51 N.M. 13 (“It must be presumed that the people know the meaning of the words they use in constitutional provisions, and that they use them according to their plain, natural and usual signification and import, and with due regard to the fact that they are framing a part of the permanent and fundamental law of the state, and with understanding of the general rules of construction as to provisions of Constitutions.”). The declaration that protection of the state’s environment is “of fundamental importance to the public interest, health, safety and the general welfare” places environmental protection within the Legislature’s police powers. Plaintiffs’ assertion that the interest in health, safety and general welfare

⁴ The Legislature reiterated in the Pollution Control Revenue Bond Act, adopted in 1973, that pollution control, consistent with economic development, fell within traditional police powers. This confirms the Legislature’s intent to address pollution “to promote the health, welfare, and safety of the citizens of this state and its habitat and wildlife, with the resultant higher level of employment and economic activity and stability.” NMSA 1978, § 3-59-3 (1973, as amended 1977).

removes legislative discretion, and authorizes heightened judicial review, **[BIC 12, 25]**, contradicts traditional deference to the legislative exercise of police powers.⁵

Contemporaneous authority explains why Section 21 included the power to regulate pollution in the Legislature’s police powers. Two years before Section 21’s passage, the Court of Appeals raised doubts about whether regulation of polluting activity exceeded police power. *State v. Dennis*, 1969-NMCA-036, ¶ 10, 80 N.M. 262. The *Dennis* court reasoned that “Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities” and “[n]o conceivable public purpose can be served by the prosecution and punishment of those who set fires for innocent and beneficial purposes” *Id.* This language constrained the Legislature’s ability to use police powers to enact environmental legislation regulating productive economic activity.⁶ Section 21 overrode *Dennis* and expressly confirmed that the Legislature’s police powers include pollution regulation.

⁵ Plaintiffs suggest that police powers only authorize protective legislation, permitting heightened review of statutes the judiciary concludes do not promote and protect safety, health, morals and the general welfare. **[BIC 25]**. New Mexico courts, however, have consistently declined to review of the “wisdom, policy, or justness” of the Legislature’s policy judgments. *Lujan Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 37 (quoting *Bounds v. State ex rel. D’Antonio*, 2013-NMSC-037, ¶ 11).

⁶ Plaintiffs assert that the State had the power to regulate industry pollution under Article XI, Section 14, **[BIC 11]**, but the *Dennis* decision, by narrowing their

Subsequent legislative action demonstrates that Section 21 was not a mandate for specific pollution control strategies. The Legislature passed the New Mexico Environmental Quality Control Act (“NMEQCA”), but repealed the statute – referred to colloquially as “little NEPA” – just three years later. NMSA 1953, §§ 12-20-1 through 12-20-7, (Repl. Vol. 3, Supp.1971) *repealed by*, N.M. Laws 1974, Ch. 46. The repeal followed a decision invalidating water quality control regulations for failure to comply with the NMECQA. *City of Roswell v. N. M. Water Quality Control Comm’n*, 1972-NMCA-160, ¶¶ 16-17, 84 N.M. 561. Legislators exercised their powers under Section 21 to both adopt *and repeal* pollution control legislation, based on changing assessments of the public interest.⁷

More recently, the Court of Appeals confirmed that Section 21 granted the Legislature discretion to determine how and whether to protect the state’s natural resources. *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 16. In *Sanders-Reed*, the plaintiffs sought a declaratory judgment recognizing a governmental duty to regulate greenhouse gas emissions and an injunction requiring

definition, limited the “police powers” referenced in Section 14, and excluded pollution control.

⁷ Plaintiffs seek to reverse this legislative judgment and ask the Judiciary to impose an environmental review process the Legislature repealed. [1 RP 106 ¶ 12].

the State to develop plans to prevent and redress atmospheric changes caused by greenhouse gases. *Id.* ¶ 3.

The Court of Appeals rejected those claims, reasoning that Section 21 and legislative action through existing statutes supersede the Judiciary's ability to "independently establish the best way to implement protections for the atmosphere, apart from its judicial review function involving EIB actions." *Id.* ¶ 16. *Sanders-Reed* underscores the fundamental problems with reading Section 21 as authority for the Judiciary to second-guess legislative judgment about the proper balance of pollution control and natural resource development. *Compare Sanders-Reed*, 2015-NMCA-063, § 16 with **[BIC 11]**.

Sanders-Reed also established that Plaintiffs could not bypass administrative processes established in the Air Quality Control Act ("AQCA"), NMSA 1978, Sections 74-2-1 to -17 (1967, as amended through 2021). The AQCA defined the judicial review available and did not permit a separate cause of action. 2015-NMCA-063, ¶ 15. And the Court of Appeals recognized that independent common-law actions challenging the sufficiency of air pollution regulation "would circumvent and render a nullity the process under the [AQCA] that has established how competing interests are addressed and decisions are made regarding regulation of the atmosphere." *Id.* This conclusion accords with the principle that without an express constitutional enforcement mechanism, individuals can only enforce

constitutional provisions as permitted by implementing statutes. *See Jaramillo v. City of Albuquerque*, 1958-NMSC-107, ¶ 14, 64 N.M. 427 (concluding that no direct action was available to enforce the provisions of Article XX, Section 19—providing for an eight hour day in public employment—without separate enabling legislation).

The text, history and interpretation of Section 21 all point away from an individual, judicially enforceable right to a specific level of pollution control.

B. Section 21 Does Not Create Fundamental Individual Rights.

As the Court of Appeals recognized, even if Section 21 created a specific legislative duty, it does not follow that the Constitution also grants an individual right to a judicially-mandated level of pollution control. [Op. ¶ 19]. Section 21 does not contain rights-creating language, was not included with other individual rights in the Bill of Rights, N.M. Const. art. II, and does not provide any objective, judicially-enforceable standard. Instead, Section 21 permits the Legislature to regulate pollution control and natural resource development to serve the public interest as a whole. An overriding individual right would vitiate the Legislature's ability to advance that collective interest.

Critically, Section 21 does not guarantee individuals a defined level of environmental quality. A conditional pollution control duty cannot support a fundamental right or allow courts to override legislative judgment. *Cf. Bounds*,

2013-NMSC-037, ¶ 31 (holding that conditional water rights “do not create an absolute right to take water”).

Plaintiffs nonetheless assert that Section 21 creates a positive individual right subject to judicial review and enforcement. **[BIC 13]**. This proposition, if adopted, would rewrite the Court’s established rights analysis. *Cf. Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 18-24. Traditionally recognized fundamental rights are negative rights. *See Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”); *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 747 (S. D. Iowa 2004) (“Fundamental rights, for equal protection or due process purposes, are negative rights, not positive rights.”). Courts intervene to prevent government from intruding on negative rights; in contrast, even positive rights enumerated in New Mexico’s Bill of Rights are not guarantees and are subject to regulation by the Legislature. *See* N.M. Const. art. II, § 4; *Otero v. Zouhar*, 1984-NMCA-054, ¶ 43, 102 N.M. 493 (holding that rights secured by Article II, Section 4 “are not absolute, but subject to reasonable regulation”), *aff’d in part, rev’d in part on other grounds*, 1985-NMSC-021.

As a framework for this new positive rights analysis, Plaintiffs point to the district court’s decision in *Yazzie v. New Mexico*, D-101-CV-2014-02224 (1st Jud. Dist. Ct. July 20, 2018). As the Court of Appeals recognized, *Yazzie* does not help Plaintiffs for two reasons. First, the decision in *Yazzie* was not appealed and lacks

precedential value. [Op. ¶ 27]. Second, the constitutional language at issue in *Yazzie* fundamentally differs from the language of Section 21. *Yazzie* involved Article XII, Section 1, which requires that New Mexico maintain an education system “open to all children of school age in the state” that must be “sufficient” to serve specified purposes. *Id.*⁸ Section 21 by contrast, does not mandate particular services and employs conditional balancing language regarding resource development and pollution control. This language permits the Legislature to weigh competing interests, and pollution control may give way where it is inconsistent with the Legislature’s obligations regarding “the use and development of [natural] resources for the maximum benefit of the people.” N.M. Const. art. XX, § 21. The Legislature must consider those interests, including the state’s interest in providing revenue from natural resource development taxes to the Severance Tax Permanent Fund to “benefit of the people of the state.” N.M. Const. art. VIII, § 10; *see also* N.M. Const. art. XXIV, § 1 (providing for lease and royalty income derived from state lands to support common schools).

⁸ The duty to establish public schools was externally imposed by the federal government. *See* Enabling Act, 36 Stat. 557, 559 (1910) (requiring certain conditions for statehood, including the provision of public, non-sectarian schools “open to all the children of said State”). In contrast, Section 21 conferred a corresponding duty and power upon the Legislature to determine the balance of environmental protection and economic development for the state.

Judge Singleton presided over *Yazzie* and *Sanders-Reed*, and her differing treatment of these two constitutional provisions underscores their material differences. While imposing broad judicial relief in the area of education, Judge Singleton recognized in *Sanders-Reed* the limited judicial role under Section 21, finding that the State had not “ignored its role in protecting the environment” and holding that protection of the atmosphere and the response to climate change are political matters best left to the Legislature. **[3 RP 526-35]**.

This Court’s protection of voting rights also does not require recognition of an individual right to pollution control. Voting stands in a unique posture as the primary example of “a fundamental personal right or civil liberty . . . which the Constitution explicitly or implicitly guarantees.” *Van Soelen*, 2023-NMSC-027, ¶ 22 (citing *Marrujo v. N.M. State Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 10, 110 N.M. 753); *id.* ¶ 26 (“The right to vote *is* the essential democratic mechanism intrinsic to these provisions that links the people to their guaranteed power and rights.”). Pollution does not directly limit public participation in democratic processes, and its control is not intrinsic to the guarantees provided in the Bill of Rights. The Constitution delegates decisions regarding critical health and safety matters, including pollution control, to the Legislature. Voters unhappy with how the Legislature balances pollution control and natural resource development can elect new representatives to strike a different balance. *See Juliana v. United States*, 947

F.3d 1159, 1175 (9th Cir. 2020); *cf. State ex rel. Gomez v. Campbell*, 1965-NMSC-025, ¶ 10, 75 N.M. 86 (recognizing that standing to challenge restrictions on the right to vote are unique and do not extend to allow individuals to raise any “problem of constitutional construction” unrelated to voting).

No state using similar constitutional language⁹ has recognized a fundamental individual right to a judicially determined level of pollution control. *See* Alaska Const. art. VIII, §§ 1–18; Colo. Const. art. XXVII, § 1; La. Const. art. IX, § 1; N.Y. Const. art. XIV, §§ 1–5; Tex. Const. art. XVI, § 59; Va. Const. art. XI, §§ 1–4. Jurisdictions interpreting parallel provisions use constitutional language to inform review of specific agency decisions. Those courts have not recognized individual rights outside of the administrative process. *See, e.g., Sagoonick v. State*, 503 P.3d 777, 785-88 (Alaska 2022) (reviewing the interaction of constitutional and statutory provisions and limiting the judicial role to reviewing challenged agency decisions through a constitutional lens and ensuring an agency has taken a “hard look” at factors material to the public interest); *In re Recovery I, Inc.*, 635 So. 2d 690, 699-700 (La. Ct. App. 1994) (applying administrative review standard and rejecting

⁹ Section 21 differs from state constitutions that expressly recognize individual environmental rights. *See* Pa. Const. art. I, § 27; Mont. Const. art. II, § 3; R.I. Const. art. I, § 17. Hawaii, Illinois, and Massachusetts protect their citizens’ environmental rights in separate articles of their charters. *See* Haw. Const. art. XI, §§ 1, 9 (1978); Ill. Const. art. XI, §§ 1, 2; Mass. Const. amend. 49.

claim that agency action violated constitutional requirement to protect natural resources); *Leland v. Moran*, 235 F. Supp. 2d 153, 168-69 (N.D.N.Y. 2002) (noting that the New York Constitution does not impose an obligation to remediate environmental harm), *aff'd*, 80 F. App'x 133 (2d Cir. 2003); *Rudder v. Wise Cnty. Redevelopment & Hous. Auth.*, 249 S.E.2d 177, 180 (Va. 1978) (rejecting claims that the Virginia Constitution required municipal entities to prepare environmental impact statements).

No distinctive characteristics of the New Mexico Constitution justify the fundamentally different approach Plaintiffs demand. Section 21 does not facially create a positive right to a minimum level of pollution control. Pollution control claims do not implicate fundamental rights “implicit in the concept of ordered liberty.” *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 30, 137 N.M. 734. Rather, pollution control joins a mix of competing health, safety and economic interests addressed through policy. *Cf. City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, ¶ 20, 111 N.M. 608 (refusing to entertain public nuisance claims against city construction because “the courts will not inquire into the wisdom of legislative and executive decisions” related to competing public interests).

Because Section 21 does not create an independently enforceable right to pollution control and Plaintiffs concede that they are not challenging any specific statute or agency action, Count I should be dismissed.

III. THE COURT SHOULD AFFIRM BASED ON BASIC PRINCIPLES OF SEPARATION OF POWERS.

Plaintiffs' claims also must fail because they violate the foundational principle that no branch of government shall encroach upon the powers of any other branch.

A. The Constitution Limits the Judicial Exercise of Legislative and Executive Powers.

The New Mexico Constitution establishes separation of powers as a constitutional mandate by dividing state government into “three distinct departments, the legislative, executive and judicial” and commanding that no one “charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]” N.M. Const. art. III, § 1.

The Legislature, as the branch of government closest to the people, holds the power to enact laws serving the interests of the people. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 25, 125 N.M. 343 (holding that only the Legislature can declare public policy or substantially alter, modify and extend law). “All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their

good.” N.M. Const. art II, § 2. “The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.” N.M. Const. art II, § 3. It follows that policy decisions of great magnitude are “particularly unsuited for judicial resolution as a matter of state constitutional law,” and rest within the “particular domain of the legislature, as the voice of the people.” *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶ 13, 132 N.M. 156; *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 40, 120 N.M. 562 (“The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue.”). The Legislature balances competing interests and determines the policies that best serve New Mexicans as a whole. *See, e.g., Clark*, 1995-NMSC-048, ¶ 36 (addressing state and tribal roles in gaming activities and concluding “the actual balance that is struck represents a legislative function”).

The New Mexico Constitution grants the Legislature police powers, the “broadest power possessed by governments,” to address public health, safety and welfare. *Lujan Grisham v. Reeb*, 2021-NMSC-006, ¶ 14. “A determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is a legislative function and should not be interfered with, save in a clear case of abuse.” *State v. Druktenis*, 2004-NMCA-032, ¶¶ 105-07, 135 N.M. 223 (quoting *State v. Collins*, 1956-NMSC-046, ¶ 8, 61 N.M. 184). The Legislature

retains “exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.” *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 14, 120 N.M. 820 (quotation omitted).

The executive is chiefly responsible for enforcing laws passed by the Legislature. N.M. Const. art. V, § 4 (providing that the Governor “shall take care that the laws are faithfully executed.”). Executive agencies may undertake rulemaking to enforce existing laws only when the Legislature delegates this authority. *See City of Albuquerque v. N.M. Pub. Reg. Comm’n*, 2003 NMSC-028, ¶ 16, 134 N.M. 472; *Clark*, 1995-NMSC-048, ¶ 40.

The Judiciary’s role “is to construe laws and render judgments in the cases that come before it.” *State ex rel. Jud. Standards Comm’n v. Espinosa*, 2003-NMSC-017, ¶ 13, 134 N.M. 59. It “is the constitutional responsibility of the courts” to consider the legality of government conduct and “safeguard[] constitutional rights.” *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 2.

The Judiciary has the sensitive duty of applying constitutional limitations to the exercise of its own powers. Recognizing this responsibility, Courts accord significant deference to the Legislature on issues of public policy and “will not question the wisdom, policy, or justness of a statute” or the Legislature’s policy judgments. *Van Soelen*, 2023-NMSC-027, ¶ 37 (citing *Bounds*, 2013-NMSC-037, ¶ 11). Courts consider whether judicial action will impede the function of coordinate

branches of government, recognizing that an “attempt to foreclose legislative action” in an area of undisputed legislative authority would disrupt the proper balance between the branches. *See Clark*, 1995-NMSC-048, ¶ 34; *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 10, 149 N.M. 42 (explaining that the doctrine of separation of powers is “implicit in [the] reasoning” of cases declining declaratory judgment actions that interrupt administrative proceedings or require administrative fact-finding).

To that end, New Mexico courts follow self-imposed “prudential rules of judicial self-governance, like standing, ripeness, and mootness” out of “concern about the proper—and properly limited—role of courts in a democratic society.” *Citizens for Fair Rates & the Env’t v. N.M. Pub. Reg. Comm’n*, 2022-NMSC-010, ¶ 28 (holding that these threshold issues “are always relevant concerns.”) (quoting *Shoobridge*, 2010-NMSC-049, ¶¶ 16).

Applying these principles, the Court cannot address Plaintiffs’ claims, or the sweeping relief Plaintiffs seek. Doing so would usurp the Legislature’s policymaking and fiscal powers, nullify administrative procedures and agency expertise, and require the Court to opine on policy without a ripe controversy or the benefit of an administrative record.

B. Judicial Review Impedes Legislative Functions.

Courts grant heightened deference to legislative judgments regarding public health, safety and welfare. *See Reeb*, 2021-NMSC-006, ¶ 14. By stating that environmental protection is “of fundamental importance to the public interest, health, safety and the general welfare,” Section 21 placed the balance of pollution control and natural resource use and development within the Legislature’s police power, at the core of legislative function. As the Court of Appeals recognized:

The PCC reserves to the Legislature policy decisions regarding pollution control, including balancing pollution-limiting legislation with the economic benefits obtained from oil and gas development, determining the maximum allowable amounts of pollution in the environment, and creating and funding enforcement agencies. In turn, the Legislature has delegated to Executive Defendants the regulatory and enforcement aspects of pollution control. To afford the relief sought by Plaintiffs in this case would both unconstitutionally infringe upon past legislative action and impermissibly encroach on future legislative power, as well as nullify Executive Defendants’ ability to act under their statutory authority.

[Op. ¶ 31]; *see also Juliana*, 947 F.3d at 1171-72 (explaining that courts cannot “order, design, supervise or implement” a remedial environmental plan to control pollution because those decisions must be made by elected representatives).

Plaintiffs’ claims rest on the notion that the Judiciary appropriately may second-guess the Legislature’s responsibility to properly balance pollution control and resource development to provide the maximum benefit to the people, and order the Legislature and Executive to implement a judicially determined balance. *See*

[BIC 25, 27 n.16] (demanding a judicial forum to challenge, with evidence, whether the Legislature “properly balanced” pollution control and resource development). To grant Plaintiffs’ relief, the Judiciary would have to formulate its own “sufficient” statutory, regulatory and enforcement framework for pollution and order the Legislature and executive departments to adopt, establish and fund this framework. *See* [1 RP 104-06, ¶¶ 1-12]. That would be an unprecedented judicial usurpation of the Legislature’s policy-making authority. By demanding the Court fashion policy changes, Plaintiffs would “foreclose legislative action in [an area] where legislative authority is undisputed.” *Clark*, 1995-NMSC-048, ¶ 34. Plaintiffs also ask the Court to remove statutory exemptions for oil and gas production, and to enact laws previously repealed by the Legislature, engaging in direct judicial law-making. [1 RP 106]. Plaintiffs’ requested relief would obligate the Court to engage in the “creation of substantive law” in an “unconstitutional encroachment upon the Legislature’s role of declaring public policy.” *Taylor*, 1998-NMSC-015, ¶ 25.

Plaintiffs further ask the Court to assume legislative authority over public funds. *See* [1 RP 106 ¶¶ 7, 10] (requesting order to fund enforcement activities and to require that executive and legislative defendants “establish a financial assurance system”). Judicial exercise of this fiscal power would violate core tenets of separation of powers. *Schwartz*, 1995-NMSC-080, ¶ 14 (“The legislature must

exercise its exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.” (quotation omitted)).

Fundamentally, the Court cannot replace legislative judgment regarding the best interests of the state with its own. The Court of Appeals properly dismissed the Complaint on this basis.

C. This Action Would Preempt and Nullify Executive Agency Action.

The Judiciary cannot wield administrative powers the Legislature delegated to agencies with subject matter expertise, cannot hold public rulemaking proceedings, and cannot issue advisory opinions preempting future agency decisions. Plaintiffs’ claims would require courts to take on all of these tasks.

To avoid intrusion on agency activity, parties may only use a declaratory judgment action to challenge administrative actions “when the matter at issue (1) is purely legal, (2) requires no specialized agency fact-finding, and (3) there is no exclusive statutory remedy[.]” *Shoobridge*, 2010-NMSC-049, ¶ 12. Courts cannot issue declaratory relief or undertake judicial review *before* an agency completes administrative rulemaking. *Id.* ¶¶ 1, 14. These limitations “on the use of the declaratory judgment action respect the role of each branch of government in the constitutional scheme and the administrative processes put in place by the Legislature.” *Id.*; *see also Beecher Carlson Ins. Servs., LLC v. Catechis*, 2023-NMCA-038, ¶ 6.

Plaintiffs seek to evade administrative procedures, including the AQCA and Oil and Gas Act (OGA), NMSA 1978, Sections 70-2-1 to -39 (1935, as amended through 2019). The rules announced in *Shoobridge* and applied in *Sanders-Reed* foreclose this strategy. Plaintiffs cannot avoid the administrative process by presenting constitutional claims because the Legislature delegated fact-finding and policymaking related to natural resource development and control of pollution to executive agencies. Plaintiffs also cannot use equitable remedies, including declaratory and injunctive relief, to evade existing statutory and administrative procedures. *See Gzaskow v. Pub. Emps. Ret. Bd.*, 2017-NMCA-064, ¶ 41 (observing that “equity jurisdiction has never given the judiciary a roving commission to do whatever it wishes in the name of fairness or public welfare”) (text only).

1. *Plaintiff’s requested relief would interfere with administrative procedures established by the Legislature.*

Courts cannot engage in administrative rulemaking proceedings. *Shoobridge*, 2010-NMSC-049, ¶ 9. As the United States Supreme Court recognized while addressing claims related to carbon dioxide emissions:

Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.

Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011) (citation omitted). New Mexico courts are no better equipped than federal courts to undertake complex review of a changing scientific record. Litigation should not “foreclose any necessary fact-finding by [an] administrative entity” or “discourage reliance on any special expertise that may exist at the administrative level[.]” *Shoobridge*, 2010-NMSC-049, ¶ 10 (quoting *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 15); *see also State ex rel. Hanosh v. N.M. Env’t Improvement Bd.*, 2008-NMCA-156, ¶ 6, 145 N.M. 269 (stating a declaratory judgment is not available when additional fact-finding or agency expertise is necessary).

Agencies, including Defendants EMNRD, the OCC, the EIB and the Environment Department have the authority to adopt or revise environmental regulations related to oil and gas production. Individuals, including Plaintiffs, can propose or oppose regulations and challenge permitting decisions related to oil and gas permitting, production, and emissions.¹⁰ The AQCA provides for the control of air pollution and contaminants, and regulates emissions in the oil and gas industry. Any person may recommend or propose regulations related to protections for the atmosphere, and all interested persons may submit data, views or arguments at hearings regarding proposed regulations or emission control requirements. NMSA

¹⁰ The OGA and related regulations address multiple forms of pollution related to oil and gas production. *See* [1 RP 222-25, 3 RP 550-51].

1978, § 74-2-6 (1992). Likewise, the Oil Conservation Division (“OCD”) has express authority to make rules and orders to protect public health, the environment, and fresh-water resources. NMSA 1978, §§ 70-2-12(B)(15), (21)-(22) (2019). The intervention rules for adjudicatory proceedings before the OCD and OCC expressly recognize this purpose. *See* 19.15.5.8 NMAC (“The [OCD] is charged with the duty and obligation of enforcing the state’s rules and statutes relating to the conservation of oil and gas, including the prevention of waste, and the protection of correlative rights, ***and the protection of public health and the environment.***”) (emphasis added). Accordingly, the rules effectively create special standing for intervenors in adjudicatory proceedings whose “participation will contribute substantially to the prevention of waste, protection of correlative rights *or protection of public health or the environment.*” 19.15.4.11(C) NMAC (emphasis added); *see also* 19.15.4.23(B) NMAC (providing for stay of OCD or OCC orders where necessary to “protect public health or the environment”). New Mexico courts generally presume that the executive is acting rationally and in good faith, and that “specific allegations of overreaching or otherwise impermissible conduct or motives should be addressed as part of particular cases, not through a wholesale attack on the entire statutory scheme.” *Johnson & Johnson v. Wilson*, 2025-NMSC-003, ¶ 41 (quoting *Delahanty v. Commonwealth*, 558 S.W.3d 489, 505 (Ky. Ct. App. 2018)).

Plaintiffs present highly technical factual allegations related to state and federal emissions standards, measurement of emissions, treatment and use of produced water, and alleged harms from pollution. [1 RP 202-05, 2 RP 280-85, 352-54]. These matters “require special agency expertise or additional fact-finding” regarding industry procedures, scientific measurement and enforcement of pollution standards. *See Shoobridge*, 2010-NMSC-049, ¶ 7. The extensive technical and legislative fact-finding necessary to determine a level and form of pollution control that is “consistent with the use and development of the state’s natural resources for the maximum benefit of the people,” N.M. Const. art. XX, § 21, must first be conducted by the agencies with the expertise and authority to determine policy in these areas.

As the Court of Appeals concluded in *Sanders-Reed*, “[s]eparation of powers principles would be violated by adhering to Plaintiffs’ request for a judicial decision that independently ignores and supplants the procedures established under the Air Quality Control Act.” *Sanders-Reed*, 2015-NMCA-063, ¶ 18 (concluding that the “practical effect of a judgment granting Plaintiffs’ requested relief” would “allow the courts to foreclose the EIB’s factfinding function, discourage reliance on the EIB’s special expertise, disregard the [AQCA’s] exclusive statutory scheme, and circumvent procedural or substantive limitations that would otherwise limit review of the EIB’s actions” (quotations omitted)); *see also Kanuk ex rel. Kanuk v. State*,

Dep't of Nat. Res., 335 P.3d 1088, 1099 (Alaska 2014) (“The limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature[.]”).

The Court should reject Plaintiffs’ demand that the Judiciary assume sweeping administrative powers. A judgment in this case, divorced from specific agency action and outside the procedures developed for protecting air and water quality and those regulating oil and gas development, will undermine existing administrative processes, improperly limit agency discretion, and foreclose normal agency rulemaking. A judicial ruling defining pollution control or the “statutory, regulatory and enforcement framework” necessary to comply with Section 21, **[1 RP 104-106]**, will preempt the administrative processes established under the OGA, the AQCA, and other environmental statutes for investigating, establishing and implementing pollution control standards. *Shoobridge*, 2010-NMSC-049, ¶ 9. Plaintiffs must propose new regulations or challenge permitting decisions through the existing administrative process. They cannot circumvent those procedures with the blunt and inflexible tool of litigation. *Id.* ¶ 14.

2. *Premature judicial review thwarts the public’s opportunity to participate in rulemaking.*

Judicially shortcutting administrative procedures also cuts the public out of the rulemaking process. *Id.* Public hearings assist agencies to determine policy and to exercise judgment or discretion in decision-making. *Id.* ¶ 9 (concluding that the

EIB held public hearings to develop legislative facts, and judicial interruption of this process interfered with an essential part of the legislative function delegated to the Board). Judicial intervention in administrative proceedings reduces public input in critical policy questions and undermines democratic principles enshrined in the state constitution. *See* N.M. Const. art. II, § 3 (“The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.”).

Allowing Plaintiffs to proceed with their claims in court would replace a process driven by public participation with judicial fiat. Such an arrangement deprives the public and affected communities of the opportunity to weigh in on pollution control and natural resource development. Recognizing the constitutional mandate that these matters are of fundamental importance to the public, it follows that such matters should not be resolved in a forum where only parties to a lawsuit may participate.

3. *The Complaint does not present an actual controversy.*

The Complaint also does not present an actual controversy for decision. *See Shoobridge*, 2010-NMSC-049, ¶ 1 (rejecting declaratory judgment claims because “there is no actual controversy to be resolved by a declaratory judgment action” related to the executive defendants). Plaintiffs do not challenge specific statutes, rules, or agency actions, and are not appealing any agency’s rejection of rules proposed through the rulemaking processes.

“[T]he judicial power to resolve disputes in a government built upon a foundation separating the legislative, executive, and judicial functions should be guided by prudential considerations.” *Citizens for Fair Rates*, 2022-NMSC-010, ¶ 28 (quoting *Shoobridge*, 2010-NMSC-049, ¶ 16). “[S]tanding, ripeness, and mootness, are founded in [a] concern about the proper—and properly limited—role of courts in a democratic society and are always relevant concerns.” *Id.*; *see also Deutsche Bank Nat’l Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 16 (courts “generally require injury in fact, causation, and redressability to establish standing” (quotation omitted)). If these elements are not met, a plaintiff generally has not stated a viable cause of action. *Deutsche Bank*, 2016-NMSC-013, ¶ 16; *see also* NMSA 1978, § 44-6-2 (1975) (permitting declaratory judgment only in “cases of actual controversy”).

A suit raising matters assigned to administrative agencies is not ripe before the agency has addressed the issue. *See Citizens for Fair Rates*, 2022-NMSC-010, ¶ 26 (holding that an action seeking a declaratory ruling that the enabling statute limited the agency’s authority was not ripe for review because the Judiciary cannot consider potential future agency action). Advisory opinions, offered before an agency acts, would allow a court to improperly wield legislative and executive powers to make and implement law. *See id.* ¶ 21 (recognizing “advantages in requiring the parties to raise constitutional issues in the administrative proceedings”). Plaintiffs have not presented the agencies with proposed regulations

or challenged permits, and the agencies in turn have not reviewed Plaintiffs' requested relief.

Plaintiffs' claims are also not redressable. Plaintiffs cannot show that relief that will address their needs is within the Court's power to grant. The Ninth Circuit addressed parallel claims for declaratory and injunctive relief seeking to require the government to cease permitting of fossil fuel use and to prepare a plan subject to judicial approval to draw down harmful emissions. *Juliana*, 947 F.3d at 1170-71. *Juliana* concluded that courts cannot grant the requested relief—a halt to oil and gas development and a wholesale revision of regulations related to greenhouse gasses—because judges cannot make the complex policy decisions required to balance the “competing social, political and economic forces” related to pollution control and resource development. *Juliana*, 947 F.3d at 1172. So too here, where Plaintiffs seek judicial orders designing, supervising, and implementing an emission control plan for the oil and gas industry. *See* [1 RP 106] (Requests 7-12). New Mexico courts, like their federal counterparts, cannot grant such expansive relief.

Moreover, limited declaratory judgment regarding compliance with Section 21 will not resolve any controversy. Even if the Legislature and agencies change pollution control measures, the Plaintiffs would charge the Court with reviewing the adequacy of any remedial plan, thereby requiring a broad range of policymaking over an indefinite period. *Juliana*, 947 F.3d at 1172. Plaintiffs do not even attempt

to limit the continuing and indefinite nature of the judicial supervision they contemplate and ask the Court to retain jurisdiction to facilitate ongoing and potentially endless enforcement of judicial orders. *See* [1 RP 106 (Request 13). Without detailed standards that go far beyond the expertise of most judges, a declaration will not provide Plaintiffs a basis for determining whether the State has breached its constitutional duties or provide Defendants with any way to measure compliance. A declaratory judgment therefore will not resolve the issues presented. NMSA 1978, § 44-6-7 (1975) (“The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.”).

D. The Complaint Presents Political Questions the Court Cannot Resolve.

As the discussion above reflects, Plaintiffs’ Complaint asks the Judiciary to take up core political questions that courts cannot resolve. New Mexico courts consider whether traditional standards of justiciability caution against judicial review. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 24, 128 N.M. 154; *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing common characteristics used in determining what constitutes a nonjusticiable political question). The Court of Appeals recognized that every factor relevant to this issue counsels against judicial review. [Op. ¶¶ 45-51]. Each of the following factors particularly cautions against judicial review: (1) a textual constitutional commitment of the issue to another

branch; (2) absence of manageable judicial standards to resolve the issue; (3) the need to make an initial policy determination requiring non-judicial discretion; and (4) whether a judicial resolution would express a lack of respect for coordinate branches. *Baker*, 369 U.S. at 217.

First, the Section 21 expressly commits the balance of pollution control and natural resource development to the Legislature. *See* Section II.A., *supra*.

Second, Section 21 provides for a balance of pollution control and natural resource development for “the maximum benefit of the people” which does not provide a manageable *judicial* standard and implicates police powers, an area of heightened legislative discretion.

Third, to address Plaintiffs’ constitutional claims a court would have to make a policy determination regarding the balance of oil and gas production and pollution control that best served the public interest of the state as a whole and engage in legislative factfinding and judgment. *See* Section II.A *supra*. Finally, a judicial resolution of these claims would “express a lack of respect for coordinate branches” by foreclosing legislative fiscal and policy-making action. Plaintiffs ask the Court to adopt previously repealed statutes, nullify statutory and administrative procedures (including those set out in the AQCA, OGA, and their enabling regulations), and assume continuous judicial supervision over New Mexico’s environmental policy. *Baker*, 369 U.S. at 217.

Plaintiffs assert that judicially manageable standards can be found for this review in legislation passed in the wake of Section 21. **[BIC 22-24]**. Precatory language, including statements of purpose, do not include clear standards for judicial enforcement. Indeed, the only “standard” Plaintiffs propose is requiring a vague “consideration of harms” to “public health and the environment.” **[BIC 24]**. This amorphous standard does not permit a court to measure whether pollution control is sufficient and would require the Judiciary to impose requirements the Legislature rejected shortly after the adoption of Section 21. *See supra* at 9 (repeal of “little NEPA”).

The Court cannot fashion a constitutional standard for pollution regulation from statutes the Legislature chose to repeal without undermining constitutional separation of powers. Plaintiffs’ request runs headlong into established precedent regarding the Legislature’s ability to change or repeal laws. It is well established that the Legislature implements public policy when enacting statutes, “policy which it is free to change in the future.” *Bartlett v. Cameron*, 2014-NMSC-002, ¶ 19; *see also Pierce v. State*, 1996-NMSC-001, ¶ 48, 121 N.M. 212 (“We presume that statutes establish current public policy subject to legislative revision rather than creating either contractual or vested rights.”). Creating constitutional rights and standards from long repealed statutes “would upset the balance of the separation of powers,

and affect the Legislature’s ability to respond to changing . . . conditions.” *Citizens for Fair Rates*, 2022-NMSC-010, ¶ 55 (quoting *Bartlett*, 2014-NMSC-002, ¶ 19).

The Alaska Supreme Court considered similar claims for relief seeking to “establish constitutional common law controlling State policy about the appropriate balancing of resource development against environmental protection” and “to jettison the constitutional mandate that the legislature manage natural resources in the public interest and for the maximum benefit to Alaskans collectively.” *Sagoonick*, 503 P.3d at 796.¹¹ The Alaska Court rejected those claims as nonjusticiable:

[Plaintiffs] sought to have courts impose the policy judgment that, when undertaking resource development under Alaska’s constitutional directive and various statutory policy pronouncements, the State must prioritize at all costs the best available science or the least climate-damaging activities. This proposed policy judgment would require continuing jurisdiction to ensure that the political branches implement what courts conclude is the appropriate balancing of interests in developing Alaska’s “resources ... for maximum use consistent with the public interest.” Asking courts to impose and enforce such a policy judgment presents a non-justiciable political question.

Sagoonick, 503 P.3d at 798 (quoting Alaska Const. art. VIII, § 1). *Sagoonick* recognized that claims challenging an entire regulatory scheme cannot be addressed

¹¹ Plaintiffs assert that *Sagoonick* is distinguishable because it asserted claims related to climate rather than pollution. **[BIC 16 n.7]**. But both cases ask courts to make broad policy interventions based on similar constitutional language. See Alaska Const. art. VIII, § 2 (“The Legislature shall provide for . . . development, and conservation of all natural resources . . . for the maximum benefit of its people.”).

without impermissibly substituting the Court’s judgment for that of the Legislature and executive agencies. *Id.* This Court should do the same.

IV. PLAINTIFFS FAILED TO STATE CLAIMS FOR VIOLATION OF SUBSTANTIVE DUE PROCESS OR EQUAL PROTECTION RIGHTS.

The Court of Appeals also correctly rejected Plaintiffs’ substantive due process and equal protection claims. Plaintiffs’ due process claims fail because the New Mexico Constitution does not “recognize, through either the Due Process or Inherent Rights Clauses or the PCC, an individual right that supports Plaintiffs’ complaint.” [Op. ¶ 57]. And Plaintiffs’ equal protection claims fail because Plaintiffs failed to identify “any statute or conduct creat[ing] any classification at all.” [Op. ¶ 60]. The Court should affirm these holdings.

A. Plaintiffs’ Due Process and Equal Protection Claims Fail Because They Seek to Compel Action by the Political Branches Rather than Challenge Government Intrusion.

Where a party challenges the constitutionality of a statute, “[t]he burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute.” *Bounds*, 2013-NMSC-037, ¶ 11 (quotation omitted). Unless the challenged statute restricts the exercise of an important right or treats those challenging the legislation differently because they belong to a sensitive class, the Court requires only that the classification challenged be rationally related to a legitimate state interest. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶¶ 12, 17,

138 N.M. 331. “We will not question the wisdom, policy, or justness of a statute, and the burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute. An act of the Legislature will not be declared unconstitutional in a doubtful case . . .” *Van Soelen*, 2023-NMSC-027, ¶ 37 (quoting *Bounds*, 2013-NMSC-037, ¶ 11).¹²

Plaintiffs’ due process and equal protection claims are not tied to any specific statute or regulation they claim is unconstitutional. The claims are not based on specific acts that purportedly shock the conscience or injure fundamental rights. The claims are not grounded on any identified statute that creates classifications based on age, geographic location, or racial status, much less one that discriminates against those classes. In fact, Plaintiffs do not seek to limit government intrusion at all. Instead, they ask the Court to use Article II, Section 18 to force the political branches to pass and implement laws that Plaintiffs would prefer. The New Mexico Constitution addresses positive needs related to health and security through flexible legislative action, not judicial enforcement of rights. *See* N.M. Const. art. IV, § 1. Plaintiffs’ claims must fail as a matter of law.

¹² Plaintiffs ask the Court to interpret Article II, Section 18 independently of federal case law on due process and equal protection, **[BIC 31-33]**, but even if this Court does so, the New Mexico Constitution does not permit Plaintiffs’ civil rights claims.

Plaintiffs' due process and equal protection claims assume that the state Constitution provides an individual, judicially-enforceable right to pollution control. Under the auspices of that claimed right, Plaintiffs seek sweeping relief (including enjoining all oil and gas permitting statewide until Defendants come into compliance with a standard that Plaintiffs do not articulate). *See* [1 RP 106]. The claimed right does not exist, and Plaintiffs' claims are incompatible with Section 21's assignment of responsibility for balancing the public interest in pollution control and resource use to the Legislature.

B. There is No Substantive Due Process Right to Environmental Policymaking by the Judiciary.

The Court of Appeals correctly held that Plaintiffs' substantive due process claims fail based on the absence of an individual right. As that court noted, in the absence of "such a right or liberty or property interest, Plaintiffs' due process claim must necessarily fail." [Op. ¶ 57] Recognizing a substantive due process right constitutionalizing environmental policy would be unprecedented, and the Court should be exceedingly wary of the consequences such a decision would have on our system of government.

"Substantive due process cases inquire whether a statute or government action shocks the conscience or interferes with rights implicit in the concept of ordered

liberty.” *Bounds*, 2013-NMSC-037, ¶ 50 (quotation omitted).¹³ “The threshold question in evaluating a due process challenge is whether there is a deprivation of liberty or property.” *Mills v. Bd. of Psych. Exam’rs*, 1997-NMSC-028, ¶ 15, 123 N.M. 421.

Judicial self-restraint requires courts “to exercise the utmost care whenever we are asked to break new ground in the field of substantive due process.” *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 31 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)), *aff’d in part, rev’d in part on other grounds*, 2016-NMSC-027. Indeed, courts “have always been reluctant to expand the concept of substantive due process.” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quotation omitted); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (cautioning against expansion of substantive due process rights “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the judiciary”). New Mexico courts review claims of substantive rights under the Due

¹³ The decision below correctly rejects, for lack of authority, Petitioners’ attempt to inject deliberate indifference in the applicable standard. **[Op ¶ 57 n.9]**. In a footnote, Petitioners renew that request here, **[BIC 44 n.22]**, but they still identify no authority applying that standard outside of the context of carceral medical care.

Process Clause in part by considering whether the federal courts recognize the right asserted.¹⁴ *Morris*, 2016-NMSC-027, ¶ 18; U.S. Const. amend. XIV, § 1.

Here, Plaintiffs ask the Court to transform “the liberties protected by the Due Process Clause to the policy preferences of the Court.” *See Morris*, 2016-NMSC-027, ¶ 23. Specifically, they attempt to broaden the scope of substantive due process claims to fully incorporate the Inherent Rights Clause. *See [BIC 33]*. But consistent with *Bounds* and *Mills*, Article II, Section 18 provides only that “[n]o person shall be deprived of life, liberty or property without due process of law,” not including within its ambit either safety or happiness. And “[t]he Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right[.]” *Morris*, 2016-NMSC-027, ¶ 51. Indeed, “[t]he Due Process Clause is not a guarantee of a minimal level of safety and security.” *Sugg v. Albuquerque Pub. Sch. Dist.*, 1999-NMCA-111, ¶ 15, 128 N.M. 1.

Federal courts also reject claims that the Due Process Clause guarantees a right to live in a contaminant-free environment. *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980), (“[T]here is no constitutional right to a pollution-free environment.”) *vacated on other grounds sub nom., Middlesex Cty.*

¹⁴ Even where an interstitial analysis is inapplicable, case law addressing parallel federal constitutional claims retains persuasive and informative value. *Van Soelen*, 2023-NMSC-027, ¶ 42.

Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, (1981); *Guertin v. State*, 912 F.3d 907, 921-22 (6th Cir. 2019) (“[T]he Constitution does not guarantee a right to live in a contaminant-free, healthy environment.”); *see also Collins*, 503 U.S. at 125-26 (holding that the Constitution does not require minimum levels of safety for employees, and rejecting due process claims related to employee’s exposure to noxious sewer fumes). When federal courts have “faced assertions of fundamental rights to a ‘healthful environment’ or to freedom from harmful contaminants, they have invariably rejected those claims.” *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) (collecting cases).

Recognizing the weakness of their due process theory, Plaintiffs assert that their claims fall within the “danger creation” exception to the rule set forth in *Sugg*. *See [BIC 45-46]*. But Plaintiffs fail to meet that standard. Indeed, they fail to recite the applicable standard at all:

There is a six-part test to determine whether Defendants created a special danger for Plaintiff. Plaintiff must illustrate that: (1) she is a member of a ***limited and specifically definable*** group; (2) Defendants’ conduct exposed Plaintiff to a substantial risk of ***proximate, immediate and serious harm***; (3) the risk was known or obvious; (4) Defendants acted in ***conscious reckless disregard*** of the risk; (5) the conduct, ***as a whole***, is conscience shocking; and (6) that Defendants created the danger or increased the danger for Plaintiff in some way.

Sugg, 1999-NMCA-111, ¶ 18 (emphasis added). As observed by federal courts, these factors counsel that danger creation can only serve as a basis for civil rights claims in “exceptional circumstances.” *See Ruiz v. McDonnell*, 299 F.3d 1173, 1184 (10th

Cir. 2002) (quoting *Eckert v. Town of Silverthorne*, 25 F. App'x 679, 689 (10th Cir. 2001)).

Plaintiffs are not members of a “limited and specifically definable group.” This phrase is not broadly construed. *See, e.g., T.D. v. Patton*, 868 F.3d 1209, 1229 (10th Cir. 2017) (defining the relevant group as “children the state has removed from their natural parent and taken into state custody”); *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1264 (10th Cir. 1998) (same for “special education students who have expressed threats of suicide”); *see also Ruiz*, 299 F.3d at 1183 (“Moreover, the conduct should be *directed at a discrete plaintiff, rather than the public at large.*”) (emphasis added). The Frontline Plaintiffs are vaguely alleged to be “people who live near oil and gas production sites,” [1 RP 7], but the remainder of the Complaint suggests that this supposedly limited group includes *anyone* living in or near the Permian or San Juan basins. *See, e.g., [1 RP 67]* The Youth Plaintiffs are young, but so is everyone at some point. And Plaintiffs’ Complaint does not at any point expressly identify who they allege comprises “Indigenous Plaintiffs,” let alone how they are members of a limited and specifically definable group. *See [1 RP 1-107]*.

Nor do Plaintiffs allege “proximate, immediate and serious harm.” “Affirmative conduct . . . should typically involve conduct that imposes an immediate threat of harm, *which by its nature has a limited range and duration.*”

See Ruiz, 299 F.3d at 1183 (emphasis added). Plaintiffs’ alleged harms are not proximate, immediate, or serious. The harms they allege are instead oblique and distant results of chronic environmental harms, not “immediate and serious” threats to their safety.

Plaintiffs do not allege that Defendants acted in conscious disregard of any risk. *See* [1 RP 1-107]. Plaintiffs’ allegations additionally fail to meet the threshold for conduct that shocks the conscience. Action that “shocks the conscience” extends beyond mere negligence; run-of-the-mill tort claims are not equivalent to violations of constitutional guarantees. *Range v. Douglas*, 763 F.3d 573, 590 (6th Cir. 2014). Plaintiffs attribute their alleged harms to oil and gas pollution, but state only a tenuous connection to the limited government action implicated here: issuing permits for drilling activities to private parties. Permitting private natural resource development activities that may result in pollution, if negligently performed, does not rise to the level of conscience-shocking behavior.

Plaintiffs do not and cannot allege conduct that meets the threshold for danger creation set forth in *Sugg*. That failure is thus fatal to the bulk of Plaintiffs’ substantive due process claims because it bars what Plaintiffs seek: a judicial proclamation recognizing a right to a fixed level of environmental safety.

C. Leaving Environmental Policymaking with the Political Branches Does Not Violate Equal Protection.

The Court of Appeals correctly held that “Plaintiffs’ allegations fail to establish a valid equal protection claim because they have not identified government-created classes of persons subject to discriminatory treatment.” [Op. ¶ 58]. Here, Plaintiffs offer nothing new, apart from an unsupported suggestion that equal protection claims cannot be decided prior to summary judgment. Accordingly, this Court should affirm the Court of Appeals’ holding.

“The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly.” *Breen*, 2005-NMSC-028, ¶ 10. If the legislation at issue does not create such a classification, the Court “need not decide which standard should apply, nor whether [the legislation] can survive scrutiny, because . . . it does not create two separate classifications subject to different treatment.” *Montez v. J & B Radiator, Inc.*, 1989-NMCA-060, ¶ 12, 108 N.M. 752. “A statute that ‘does not create two separate classifications subject to different treatment’ cannot be said to violate equal protection.” *State v. Gwynne*, 2018-NMCA-033, ¶ 42 (quoting *Montez*, 1989-NMCA-060, ¶ 12).

Plaintiffs contend, without authority, that equal protection claims cannot be tested at the motion to dismiss stage. *See* [BIC 39-40]. Plaintiffs are wrong. *See*,

e.g., *Vandolsen v. Constructors, Inc.*, 1984-NMCA-023, ¶ 1, 101 N.M. 109 (affirming dismissal of equal protection claim for failure to state a cause of action).

As the decision below recognizes, Plaintiffs' claims fail because they do not allege separate classifications subject to different treatment. [Op. ¶ 58].

Indeed, rather than identifying any legislative classification, Plaintiffs assert that oil and gas pollution has a disparate impact on their three proposed classes. *See* [BIC 36-37]. But absent legislative classification, a neutral state law that “produces disproportionate effects” violates equal protection only upon “[p]roof of racially discriminatory intent or purpose[.]” *Welch v. Sandoval Cnty. Valuation Protests Bd.*, 1997-NMCA-086, ¶ 15, 123 N.M. 722 (quoting *Hunter v. Underwood*, 471 U.S. 222, 227 (1985)). Plaintiffs ignore *Welch* and instead rely upon distinguishable cases to argue that intent is not required. *See* [BIC 37]. Plaintiffs' reliance is misplaced because the classifications in those cases flow from statutory language.

For example, in *Gonzales v. Dep't of Health*, 2000-NMSC-029, ¶ 30, 129 N.M. 586, this Court held that disparate impact claims in employment cases do not require a showing of discriminatory intent, relying on *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1236 (10th Cir. 1991), *abrogated by statute on other grounds*. *Ortega*, in turn, relied on *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988), which relied on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). These cases arise not from constitutional language, but from Title VII of the federal Civil Rights

Act of 1964. *See Griggs*, 401 U.S. at 429-430 (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. . . . ***Under the Act***, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”) (emphasis added); *see also* 42 U.S.C. § 2000e-2(a)(2). Similarly, *Hill v. Community of Damien of Molokai*, 1996-NMSC-008, ¶ 1, 121 N.M. 353, involved a claim premised not upon the Constitution, but upon the Fair Housing Act. *See id.* ¶ 1. Finally, Petitioners’ reliance on *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, and *Albuquerque Commons Partnership v. City Council of Albuquerque*, 2008-NMSC-025, 144 N.M. 99, is wholly misplaced. In *Ochoa*, far from disregarding intent, the court held that even when there was an objectively reasonable basis for a traffic stop, intent could be considered in determining whether a stop was pretextual. *See* 2009-NMCA-002, ¶¶ 39-40. In *Albuquerque Commons*, this Court noted that substantial evidence showed that a zoning change was “directed specifically towards ACP and were not public policy matters of a general character.” 2008-NMSC-025, ¶ 43. None of these cases support equal protection claims based on disparate impact.

Plaintiffs do not and cannot allege that the State’s laws regarding environmental protection and natural resource development intentionally

discriminate against them. [See **RP 1-107**]. After all, the State has no control over where oil and gas resources lie beneath the ground.

Separate from the requirement to show intent, Plaintiffs failed to state a claim because they do not allege facts that would show “legislation creat[ing] a class of similarly situated individuals who are treated dissimilarly.” See *Breen*, 2005-NMSC-028, ¶ 10. As the decision below correctly recognizes, Plaintiffs’ claims rest on their proximity to oil and gas development, and Plaintiffs are thus not similarly situated to other New Mexicans. [**Op. ¶ 61**]. The classifications Plaintiffs rely on are creations of geography, not statute.

Plaintiffs offer no authority contrary to the Court of Appeals’ conclusion on this issue; instead, they attempt to argue that their claims are not based on geographic location. That attempt borders on absurdity. Indeed, Plaintiffs’ briefing on this issue speaks for itself:

Plaintiffs’ disparate impact claims are not based on *their geographic location*, but on Defendants’ conduct in granting oil and gas permits while failing to regulate these very dangerous activities *where Plaintiffs live*.

[**BIC 39**] (emphasis added). Because Plaintiffs live in proximity to oil and gas development, they are not similarly situated to other New Mexicans, and the facially neutral framework Plaintiffs challenge, treat Plaintiffs no differently than other New Mexicans. Plaintiffs thus fail to state an equal protection claim upon which relief can be granted.

CONCLUSION

The Legislature and the Executive Defendants, the branches of government most accountable to the citizens of New Mexico, created a substantial statutory and regulatory framework for protecting the environment and developing the state's natural resources. As directed by Article XX, Section 21 of the New Mexico Constitution, the Legislature and relevant agencies developed and revised this framework over time to address new challenges as they arise. Plaintiffs invite the Court to insert itself into the political process and overrule those policy choices. Because Section 21 does not create an enforceable right to pollution control, and no justiciable standard exists to guide this Court through such a precarious political analysis, the Court should affirm the Court of Appeals and direct the district court to dismiss Plaintiffs' action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March 2026, I filed the foregoing electronically through the Odyssey File & Serve system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic filing:

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